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TRADE AND DEVELOPMENT BOARD
Working Party on the Medium-term Plan
and the Programme Budget

LEGAL OPINION BY THE UNDER-SECRETARY-GENERAL FOR LEGAL AFFAIRS, THE LEGAL COUNSEL

Note by the UNCTAD secretariat

In response to the memorandum of 24 March 1993 from the Director of the UNCTAD Division for Programme Support and Management Services, the United Nations Controller has transmitted the Legal Opinion of the Legal Counsel regarding the provision to the Working Party on the Medium-term Plan and the Programme Budget of detailed information on financial and resource distribution, in addition to the UNCTAD programme of work. The text of the Legal Opinion and the comments of the Controller are annexed to this note.

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Annex I

LEGAL OPINION BY THE LEGAL COUNSEL OF THE UNITED NATIONS REGARDING THE PROVISION TO THE WORKING PARTY OF DETAILED INFORMATION ON FINANCIAL AND RESOURCE DISTRIBUTION, IN ADDITION TO THE UNCTAD PROGRAMME OF WORK

A. The Issues

In his memorandum, the Director of UNCTAD-DPSMS sought a legal opinion as to whether or not detailed information on financial and resource distribution, in addition to information regarding the UNCTAD programme of work, should be provided to the Working Party on the Medium-term Plan and the Programme Budget (hereinafter, the "Working Party") of the United Nations Conference on Trade and Development (hereinafter, "UNCTAD"). By your memorandum, you requested that this office address the question raised by the Director of UNCTAD-DPSMS, in view of both the importance of the question itself and the prerogatives of the various actors involved in the programme planning and budgetary process.

We note that the question referred to this Office apparently arose from the wording of paragraph 13 of the Instructions for the Preparation of Submissions for the Secretary-General's Proposed Biennial Programme Budget, 1994-1995 (hereinafter, the "Instructions"), which states as follows:

> "13. Once the proposed programme budget is published in fascicle form, it may be reviewed only by the Committee for Programme and Coordination and the Advisory Committee on Administrative and Budgetary Questions, in accordance with their respective terms of reference, and their recommendations will be provided to the General Assembly through their reports. Specialized intergovernmental bodies do not review the programme budget proposals of the Secretary-General. However, all Departments and Offices should submit the appropriate intergovernmental body (sic) a copy of the programme of work (i.e., the programme narrative) as submitted to CPC and ACABQ in the relevant fascicle or based on your proposals if the specialized body meets before the fascicle is finalized." (Emphasis added.)

The Working Party apparently has taken the position that nothing in the Financial Regulations and Rules of the United Nations or the Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation (hereafter, the "Programming Regulations and Rules") supports the position taken by the Administration, as set forth in the above-quoted paragraph of the Instructions. Indeed, the Working Party believes that it is entitled to receive and evaluate financial information and related data for the purpose of reviewing the programme budget of UNCTAD.

In support of its position, the Working Party refers to Rule 104.7(c) of the Programming Regulations and Rules, which provides as follows:

> "Rule 104.7(c). The programmes of work submitted by programme managers to specialized intergovernmental organs should contain programme elements and output specifications identical to those in the programme portion of the proposed programme budget. This does not preclude the addition of further information and detail, if required by the specialized intergovernmental organs." (Emphasis added.)

Consequently, it appears that certain of the UNCTAD delegations intend to draft terms of reference for the Working Party that would state, inter alia, that the Working Party would review the programme budget of UNCTAD, including any aspects concerning financial resource allocation, prior to the submission of the budget to the Office of Programme Planning, Budget and Finance at Headquarters.

B. Mandate of UNCTAD

The Conference

The United Nations Conference on Trade and Development (UNCTAD) was established by the General Assembly Resolution 1995 (XIX) of 30 December 1964, as an organ of the General Assembly, in accordance with the provisions set forth in Section II of that resolution. The Conference is composed of states which are Members of the United Nations or members of the specialized agencies of the International Atomic Energy Agency. The principal functions of the Conference, as specified in Section II of the resolution (at paragraph 3 thereof) consist of: the promotion of international trade between countries; the formulation of principles and policies on international trade and related problems of economic development and making recommendations for their implementation, as well as generally reviewing and facilitating the coordination of activities of other institutions within the United Nations system in the field of international trade and related problems of economic development.

The Trade and Development Board

In paragraphs 4 through 24 of its resolution 1995 (XIX), the General Assembly established "a permanent organ of the [United Nations Trade and Development] Conference, the Trade and Development Board" (at paragraph 4), whose responsibility, when the Conference was not in session, was to "carry out the functions that fall within the competence of the Conference" (at paragraph 14). The Board was also charged with the responsibility of "keeping under review and taking appropriate action within its competence for the implementation of the recommendations, declarations, resolutions and other decisions of the

Conference and for ensuring the continuity of its work" (at paragraph 15). Finally, the Board was directed to "establish such subsidiary organs as may be necessary to the effective discharge of its functions" and was given authority to determine the terms of reference and rules of procedure of its subsidiary organs and bodies (at paragraph 23).

The Working Party

The Working Party on the Medium-term Plan and the Programme Budget was set up by the Board, and is one of the subsidiary organs provided for in paragraph 23 of the General Assembly resolution.

Secretariat

With regard to the administration of UNCTAD, the General Assembly specified, in paragraph 26 of the resolution, as follows:

> "26. Arrangements shall be made, in accordance with Article 101 of the charter, for the immediate establishment of an adequate, permanent and full-time secretariat within the United Nations Secretariat for the proper servicing of the Conference, the Board and its subsidiary bodies."[1]

On the financial arrangements, the General Assembly provided, in paragraph 29 of the resolution, as follows:

> "29. The expenses of the Conference, its subsidiary bodies and secretariat shall be borne by the regular budget of the United Nations, which shall include a separate budgetary provision for such expenses. In accordance with the practice followed by the United Nations in similar cases, arrangements shall be made for assessments on States not members of the United Nations which participate in the Conference." (Emphasis added.)

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[1] It should also be noted that in paragraph 27 of its resolution 1995 (XIX), the General Assembly decided that the UNCTAD "secretariat shall be headed by the Secretary-General of the Conference, who shall be appointed by the Secretary-General of the United Nations and confirmed by the General Assembly."

C. Opinion

Based on the nature of the functions entrusted to the Conference and the Board of UNCTAD, it is clear that the General Assembly intended to separate the inter-governmental governance of UNCTAD, as it relates to its substantive programme, from the administrative and financial management of UNCTAD, which was entrusted to the Secretary-General. In this respect, the institutional framework in which UNCTAD operates differs significantly from that of other subsidiary organs of the General Assembly, such as UNDP or UNICEF, which are financed from voluntary contributions and whose inter-governmental governing bodies have been vested with supervision and oversight over their substantive programmes as well as their financial and operational activities. A consequence of that different constitutive character of UNCTAD is that the review and approval of the programme and administrative budget proposals for UNCTAD follows the same procedure as that of the United Nations regular biannual budget. This is essentially so because UNCTAD is financed from the regular budget.

In its resolution 45/248 (Part IV), the General Assembly has stated that it:

> "1. Reaffirms that the Fifth Committee is the appropriate Main Committee of the General Assembly entrusted with responsibilities for administrative and budgetary matters;
>
> 2. Reaffirms also the role of the Advisory Committee on Administrative and Budgetary Questions;
>
> 3. Expresses its concern at the tendency of its substantive Committees and other intergovernmental bodies to involve themselves in administrative and budgetary matters;
>
> 4. Invites the Secretary-General to provide all inter-governmental bodies with the required information regarding procedures for administrative and budgetary matters."

It is clear from the above, that the statement in paragraph 13 of the submission of the 1994-1995 Proposed Biennial Programme Budget, that "specialized intergovernmental bodies do not review the programme budget proposals of the Secretary-General", was intended to implement the requirements of the General Assembly in resolution 45/248. However, the Working Party was established by the Board of UNCTAD with the specific task of dealing with the Medium-term Plan and the Programme Budget of UNCTAD. Since the Working Party is itself a creation of an inter-governmental body, it must be assumed that in establishing the Terms of Reference of this subsidiary body, sufficient consultation took place between the Board and the appropriate organs of the United Nations on budgetary matters.

in this case the ACABQ and the Fifth Committee, with a view to avoiding duplication and overlapping of responsibilities, as is required in paragraph 23 of General Assembly Resolution 1995 (XIX). Paragraph 23 of the resolution reads:

> "The terms of reference of ... any other subsidiary organs established by the Board shall be adopted after consultation with the appropriate organs of the United Nations and shall take fully into account the desirability of avoiding duplication and overlapping of responsibilities."

In this case, therefore, we have to be guided by the assumption that the Board and its Working Party, do not duplicate the work of other United Nations organs when reviewing the proposals for the Medium Term Plan and the Programme Budget relative to UNCTAD. UNCTAD, acting through its organs, exercises authority over the formulation of its work programme and as a subsidiary organ of the General Assembly, it is accountable to it for the implementation of that programme. In view of the fact that the establishment of priorities of the programme invariably depends on the allocation of financial resources, it is clear that the organs charged with oversight over the UNCTAD programme must have a say in the allocation of resources for its implementation. In this latter respect the Board of UNCTAD is different from the "substantive committees" of the General Assembly and "other intergovernmental bodies" referred to in paragraph 3 of resolution 45/248. The Committees of the General Assembly, such as the Second and Third Committee, or the specialized intergovernmental bodies such as the International Law Commission perform clearly different functions and cannot be equated to the Trade and Development Board, which is one of the governing organs of UNCTAD.

In the circumstances, we have come to the conclusion that in order to properly discharge its functions, the Working Party and the Board of UNCTAD must be provided the same information in respect of the Medium-term Plan and the Programme Budget of UNCTAD as is provided to the Fifth Committee, the ACABQ and CPC. This information should clearly include details of the financial and resource distribution for implementation of the UNCTAD work programme.

Annex II

COMMENTS OF THE CONTROLLER OF THE UNITED NATIONS ON THE LEGAL OPINION

In his memorandum of transmittal, dated 16 June 1993, the Controller made, inter alia, the following comments:

> Although I do not share fully the opinion of the Legal Counsel, I do not intend to challenge it or request another review. Thus, I would recommend that, upon request, you provide the Working Party, when it reviews the programme of work of UNCTAD, with as detailed information on financial and resource distribution as possible. It should be clearly understood, however, that the provision of such detailed information does not imply any change in the prerogative of the Secretary-General to decide on the programme content and resource allocation of the programme budget of UNCTAD to be submitted to the General Assembly. The TDB and its Working Party should also be made aware that the final decision on the programme budget proposals of the Secretary-General is the prerogative of the General Assembly, and that the Assembly takes its decision on the basis of the recommendations of the Committee for Programme and Coordination and the Advisory Committee on Administrative and Budgetary Questions only. In this context, I would also like to draw your attention to the provisions of Regulation 4.9 and rule 104.9 of the Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation, regarding the submission to the TDB or the Working Party of a statement on the programme budget implications of any proposal involving either a change in the programme budget approved by the General Assembly or the possible requirement of expenditure.